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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. CHRISTIAN AGUILAR, Defendant and Appellant.	B207295 (Los Angeles County Super. Ct. No. BA306490)

APPEAL from a judgment of the Superior Court for Los Angeles County, John S. Fisher, Judge. Affirmed as modified.

Derek K. Kowata, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Robert David Breton, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Christian Aguilar appeals from a judgment sentencing him to life in prison without the possibility of parole (LWOP) and a consecutive 25 years to life term after a jury found him guilty of first degree murder with special circumstances and found a firearm allegation to be true.[1] He contends his due process rights were violated by the admission of evidence of a prior uncharged offense. We conclude no such violation occurred. However, as defendant argues and the Attorney General concedes, the trial court erroneously imposed and stayed a parole revocation fine. That fine must be stricken, since defendant is not entitled to parole under his LWOP sentence. Finally, although amendment of the abstract of judgment is not required to reflect the striking of the parole revocation fine because that fine was never recorded in the abstract, the abstract of judgment nevertheless must be amended because it fails to show defendant's LWOP sentence.

BACKGROUND[2]

Gabriel Reyes, a 14 year old member of the La Mirada Locos gang, was shot and killed outside a Yoshinoya restaurant at Sunset Boulevard and Fountain Avenue in Los Angeles shortly after 7:00 p.m. on January 9, 2002. Michael

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[1] The trial court misspoke when pronouncing defendant's sentence, saying: "The defendant is sentenced to [the] term prescribed by law[,] which is life without the possibility of parole, 25 years to life without the possibility of parole." In their briefs on appeal, defendant and the Attorney General refer to the sentence without comment as 25 years to life without the possibility of parole. No such sentence exists.

[2] We note that, in reviewing the factual background of this case, we received little assistance from the respondent's brief filed by the Attorney General. Most of the citations to the record in the respondent's statement of facts were presented as string citations at the end of paragraphs, rather than after each fact, and a significant number of those citations failed to support the facts stated. Moreover, included in the statement of facts are matters never presented to the jury.

Freeman, who was standing about three feet from Reyes when he was shot, had just eaten dinner at the restaurant and stepped outside. He saw Reyes talking with a couple of people outside the restaurant, which was known as a place where members of La Mirada Locos would hang out. A red truck or sports utility vehicle[3] pulled into the parking lot, driving very slowly, and Freeman noticed that Reyes and his friends became agitated. Freeman lost sight of the truck when it drove behind a van, then suddenly heard a single shot ring out and Reyes say that he was hit. The truck pulled out of the parking lot, going very fast, onto Fountain Avenue. He did not see who was in the truck -- he could only see two shapes, and could not tell their sex or hairstyle. Freeman called 911, and left after the ambulance came (the police arrived several minutes later). He talked to the police the following day and told them what he saw. Police who arrived at the scene shortly after the shooting found no spent shell casings; the bullet recovered from Reyes' body appeared to have been fired from a revolver.

Two days after the shooting, Sonia Penate, who lived in one half of a duplex and rented the other half to defendant's family, overheard defendant speaking angrily with his sister Judy. He asked where his mother was, and told Judy that he had shot someone. Judy asked him where it happened, and defendant said "Yoshinoya." Penate immediately called 911 and brought the handset to the window in order to record what defendant was saying, because she was scared that defendant might beat his sister. It appeared that the 911 operator could not hear what was going on, because the operator kept asking what the emergency was, so Penate told the operator that a young latino was beating a minor. When the police arrived, Penate denied that she had called 911, because Judy and defendant's wife

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[3] Freeman described the vehicle initially as a red Dodge Ram "crew cab" with a camper shell or canopy. At trial, he testified that it was a "red Suburban-type S.U.V. vehicle" that had a window on the back that made it look like it had a canopy on it.

were there and she was scared. A couple of days later, Penate went to the police station and told the police that she had heard defendant say he had shot someone.

Six weeks after the shooting, Jason Singleton, who had been arrested for attempted murder in an unrelated incident, told detectives that he had information about Reyes' murder. Singleton was a member of La Mirada Locos, and had known Reyes since Reyes was two years old. He said that he was standing on the corner of Sunset Boulevard and Sanborn Avenue (which is a few blocks away from Yoshinoya) at around 7:20 p.m. or 7:30 p.m. on January 9, 2002, when he saw defendant in a red Blazer-type sports utility vehicle that was going north on Sanborn.[4] He knew defendant from junior high school and high school, and had worked with him at Toys R Us in 1999; he also knew that defendant was in the Head Hunters gang, and had the moniker Demon. Defendant was in the car with a woman Singleton knew as Nesia (whose name is Brigette Bakonyi). The car pulled over, and defendant got out and said, "La Mamadas, you fucking rankers."[5] Singleton saw that defendant had a gun, which he could tell was a revolver. Singleton took off and ran to his house, which was nearby. Shortly after he arrived home he received a telephone call from a friend, telling him that Reyes had been killed.

A month after interviewing Singleton, Detective James King interviewed Bakonyi and conducted a search of her residence. He recovered several photographs (including ones in which Bakonyi is shown making Head Hunters

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[4] We note there were some inconsistencies between what Singleton told the detectives when they interviewed him and his testimony at the preliminary hearing (which was read to the jury because Singleton was declared unavailable). Portions of his interview, which was taped, were played for the jury.

[5] "La Mamadas" is a derogatory term used by rival gangs to refer to La Mirada Locos.

gang signs), letters between Bakonyi and defendant, and phone books (one of which had Head Hunters writing in it).

King also discovered during his investigation that defendant's mother owned a red Jimmy sports utility vehicle until shortly before the shooting, when she transferred title to the car to her sister, and that defendant had received a traffic ticket while driving that car in November 2001, two months before the shooting. Even though defendant's mother transferred title to the car to her sister, the address on the registration did not change and the car continued to be parked on the street where defendant and his mother lived.

Murder charges were filed against defendant in April 2002, and defendant was located and arrested in June 2002. The case was scheduled for preliminary hearing in December 2002, but Detective King was unable to locate Singleton or Bakonyi in the weeks before the scheduled hearing, and the case was dismissed.

After the dismissal, defendant was transferred to the West Valley Detention Center in San Bernardino County, where a deputy sheriff for the San Bernardino County Sheriff's Department was asked to monitor defendant's incoming and outgoing mail for possible evidence. The deputy searched defendant's cell and found several letters among defendant's personal property. He photocopied the letters and sent them to the requesting detective. In the letters, defendant appears to discuss his desire to keep Bakonyi and Singleton from testifying.

In June 2006, Detective King was able to locate Bakonyi, and murder charges were refiled against defendant in July 2006. Defendant was arrested, and while he was being transported to the police station, he kicked out the passenger seat rear window and tried to crawl out while the car was moving at high speed on the freeway. Defendant was placed in a jail cell that was equipped with a recording device, and a tape was made of defendant's conversations with his cellmates. In a portion of the recording that was played for the jury, defendant was

heard talking to a cellmate about how the police must have found someone who was willing to talk to them, even though he thought his "homies took care of it."

The preliminary hearing was held in March 2007, during which Singleton (but not Bakonyi) testified, and defendant was held to answer. Defendant was charged by information with one count of murder (Pen. Code,[6] § 187, subd. (a)) with two special circumstances. The first alleged that defendant personally and intentionally discharged a firearm from a motor vehicle at a person outside the vehicle with the intent to inflict death. (§ 190.2, subd. (a)(21).) The second alleged that defendant intentionally killed Reyes while defendant was an active participant in a criminal street gang, for the benefit of the gang. (§ 190.2, subd. (a)(22).) The information also included firearm allegations under section 12022.53, and gang allegations under section 186.22, subdivision (b)(1)(A).[7]

Before trial, the prosecutor indicated that she intended to introduce evidence of an incident involving defendant that took place in June 2001, seven months before the murder at issue in this case. Defendant sought to exclude that evidence, but the trial court ruled it was admissible. Therefore, evidence was presented at trial that in June 2001, defendant and another member of the Head Hunters challenged and had a fist fight with three members of La Mirada Locos -- including Reyes -- and as the La Mirada Locos members were fleeing, defendant hit one of them with his car, breaking her leg, and then got out of his car and fought with the other when Reyes left to call for an ambulance.

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[6] Further undesignated statutory references are to the Penal Code.

[7] Although the information contained an allegation of a prior conviction under the Three Strikes Law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), the record does not reflect what became of the allegation.

The jury found defendant guilty of murder, and found both special circumstances to be true. The jury also found the firearm allegation (§ 12022.53, subd. (d)) and gang allegation to be true.

The trial court sentenced defendant to LWOP on the special circumstances murder (see fn. 1, *ante*), plus 25 years to life on the firearm enhancement, and imposed both restitution and parole revocation fines and various fees. Defendant timely filed a notice of appeal from the judgment.

DISCUSSION

A. *Admission of Evidence of a Prior Uncharged Offense*

As noted above, the prosecution presented evidence at trial of a prior assault with a deadly weapon or simple assault committed by defendant. The evidence established that on June 4, 2001, defendant and another young man (Sergio Bermudez, who also was a members of the Head Hunters gang) approached Jessyca Martinez, her brother Jose Ramirez, and Reyes at a swap meet at Santa Monica Boulevard and Vermont Avenue, which was in La Mirada Locos territory, and asked Ramirez where he was from. Martinez and Ramirez, like Reyes, were members of La Mirada Locos. Ramirez hit one of the men in the face, and a short fight broke out between defendant and Bermudez, and Ramirez and Reyes. After the fight, Martinez, Ramirez, and Reyes left the swap meet in one direction, and defendant and Bermudez left in a different direction. Martinez, Ramirez, and Reyes crossed Santa Monica Boulevard and were running away when a blue Honda Civic driven by defendant hit Martinez from behind, breaking her leg. Ramirez stopped to pull her out of the street and told Reyes to go call an ambulance, while the Civic made a U-turn and stopped. Defendant and Bermudez got out of the car and fought with Ramirez, then got back in the car and drove off. Ramirez (who was bleeding and had numerous lacerations to his back, neck, and

head) and Martinez were both taken to the hospital by ambulance; Martinez was hospitalized for a week.

The jury was instructed that it could consider this evidence of the 2001 incident "only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the uncharged offense[]." (CALCRIM No. 375.) The jury also was instructed that, if it decided that defendant committed the uncharged offense, it could, but was not required to, "consider that evidence for the limited purpose of deciding whether or not the defendant acted with the intent to kill and/or that the defendant had a motive to commit the alleged offense in this case. [¶] In evaluating this evidence, consider the similarity or lack of similarity between the uncharged offense and the charged offense. Do not consider this evidence for any other purpose except for the limited purpose of establishing intent and motive. Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime." (*Ibid.*) Finally, the jury was cautioned that, if it concluded that defendant committed the uncharged offense, "that conclusion is only one factor to consider along with all of [the] other evidence. It is not sufficient by itself to prove that the defendant is guilty of murder or any other specific allegations. The People must still prove each element of every charge beyond a reasonable doubt." (*Ibid.*)

On appeal, defendant argues that admission of the evidence was improper because it "was introduced for the improper use of proving [defendant's] propensity to commit murder on behalf of his gang, and that his defense, premised on a denial of culpability, lacked merit." Defendant also asserts that the evidence of the uncharged offense was not probative because the 2001 incident and the 2002 murder were completely dissimilar, and therefore did not tend to show that defendant harbored the same intent or motive with regard to the charged offense. We disagree.

Although evidence of an uncharged crime is not admissible to prove a defendant's propensity to commit criminal acts, it is admissible when relevant to prove a defendant's intent or motive in committing the charged crime. (Evid. Code, § 1101; *People v. Kipp* (1998) 18 Cal.4th 349, 369.) "The admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence." (*People v. Carpenter* (1997) 15 Cal.4th 312, 378-379, superseded by statute on another ground as noted in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106-1107.)

In the present case, defendant's intent and motive -- the only purpose for which the other crimes evidence was presented[8] -- clearly were material. The People were required to prove, among other things, that defendant intentionally killed Reyes to further the activities of a criminal street gang. By pleading not guilty, defendant put in issue his intent and motive. (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 379.)

The 2001 uncharged offense also had a strong tendency to prove defendant's intent and motive. In the prior incident, Head Hunters members defendant and Bermudez issued a gang challenge to La Mirada Locos members Martinez, Ramirez, and Reyes in La Mirada Locos territory by asking them where they were from. After engaging in a fist fight with the La Mirada Locos gang members, defendant attacked one of them by running into her with his car as they were trying to flee and then stopped to beat up another as he tried to assist his injured sister. In the charged offense, defendant attacked the third La Mirada Locos gang member

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[8] Contrary to defendant's assertion, the other crime evidence was not presented to prove defendant's criminal propensity. Indeed, the jury was instructed that it could consider the evidence only for the purpose of deciding defendant's intent and/or motive, and it was specifically instructed that it could not conclude from that evidence that defendant is disposed to commit crime.

he had fought with seven months earlier by shooting and killing him while he was standing outside a known hangout for La Mirada Locos members. While the method of attack in the later incident was different from the methods he used in the prior attacks, the incidents are sufficiently similar -- deadly force attacks against La Mirada Locos members in La Mirada Locos territory -- "'to support the inference that the defendant "'probably harbor[ed] the same intent in each instance.' [Citations.]"'" (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 379, quoting *People v. Ewoldt* (1994) 7 Cal.4th 380, 402 and *People v. Robbins* (1988) 45 Cal.3d 867, 879.)

Finally, there is no rule or policy that requires exclusion of the evidence. "Evidence of uncharged crimes is inherently prejudicial but may still be admitted if it has substantial probative effect. [Citation.] The matter lies within the discretion of the trial court." (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 380, citing *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404.) We find no abuse of discretion here.

"The principle factor affecting the probative value of an uncharged act is its similarity to the charged offense. Other factors affecting the probative value include the extent to which the source of the evidence is independent of the charged offense, and the amount of time between the uncharged acts and the charged offense. The factors affecting the prejudicial effect of uncharged acts include whether the uncharged acts resulted in criminal convictions and whether the evidence of uncharged acts is stronger or more inflammatory than the evidence of the charged offenses." (*People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1211.)

Here, the uncharged and charged offenses were similar in that both involved attacks on La Mirada Locos members within their territory, and the offenses occurred within a relatively short period of time of each other. Moreover, the evidence of the 2001 incident and the 2002 murder came from independent sources; none of the witnesses who provided evidence of the 2001 incident

provided evidence of the 2002 murder. Therefore, the probative value of the evidence of the uncharged offense was substantial. (*People v. Kipp*, *supra*, 18 Cal.4th at pp. 371-372; *People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 404-405.) In contrast, the risk of significant prejudice from that evidence was not unusually grave in this case. Although the uncharged acts did not result in a criminal conviction -- a circumstance that might "increase[] the danger that the jury might have been inclined to punish defendant for the uncharged offenses, regardless whether it considered him guilty of the charged offense[]" (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 405) -- the evidence concerning the uncharged offense was no stronger or inflammatory than the evidence concerning the charged offense. It is highly unlikely that the jury convicted defendant of murder even though it disbelieved the evidence concerning that offense, simply because its passions were inflamed by the evidence of the prior assaults, especially given the limiting instruction the trial court gave the jury regarding that evidence. (*Ibid.*; see also *People v. Kipp*, *supra*, 18 Cal.4th at p. 372.)

In short, we conclude that the trial court did not abuse its discretion by admitting the evidence of the 2001 incident.

B. *Parole Revocation Fine and Amendment of Abstract of Judgment*

At sentencing, the trial court imposed a $200 parole revocation fine. Defendant argues that, in light of his LWOP sentence, the fine must be stricken. The Attorney General agrees that the fine was improper and must be stricken. The parties are correct. Under the plain language of section 1202.45, a parole revocation fine is imposed only when a defendant's sentence includes a period of parole. Since an LWOP sentence precludes parole, no parole revocation fine may be imposed. (*People v. Jenkins* (2006) 140 Cal.App.4th 805, 819.)

The abstract of judgment, which was amended on December 22, 2008 to reflect defendant's custody credits, does not show that a parole revocation fine was imposed, and therefore no amendment is necessary to reflect our ruling on that issue. Nevertheless, the abstract of judgment must be amended because it incorrectly shows that defendant was sentenced to 25 years to life on the special circumstances murder count, rather than the LWOP sentence that was required under section 190.2 and imposed by the trial court.

DISPOSITION

The trial court is directed to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment reflecting that the trial court imposed a sentence of life without the possibility of parole on count 1. The parole revocation fine is stricken. In all other respects, the judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J. SUZUKAWA, J.